No. 12,906

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

RINA MARIA VATUONE, as Administratrix of the Estate of Paul D. Vatuone, Deceased,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

Rina Maria Vatuone, administratrix of the estate of Paul D. Vatuone, brought this action under the provisions of the Public Vessels Act, 46 U.S.C.A., 781 et seq., against the United States for the death of her husband, who was injured and killed on June 15, 1949, while engaged as a rigger employed by the Army Transport Service at Fort Mason, San Francisco, California, Port of Embarkation. Vatuone was sent, on the date of his death, aboard the Army

transport "General D. E. Aultman" to do certain repair work on the davits of No. 5 Lifeboat. (R. 15.) The vessel was owned and operated by the Army Transport Service, and at the time, said vessel was in the navigable waters of the United States and docked alongside a dock at Oakland, California. While decedent Vatuone and another workman were manually winding a cable around the drum of the winch which operated said No. 5 lifeboat, appellant carelessly and negligently put in operation the motor operating said winch so that said winch suddenly and very swiftly revolved, and the handle of the winch struck decedent with such force that he was thrown violently to the deck and was killed. (R. 16.) The testimony showed that the motor operating the winch was not under the control of the riggers, including Vatuone, but that said motor was under the control of the electrician included in the crew of said vessel. (R. 161-185.) The Court below found that Vatuone was killed through the negligence and carelessness of the appellant.

Vatuone was survived by his dependent widow and his infant daughter. (R. 16.)

Shortly after Vatuone's death, the authorities at the Fort Mason Army Transport Service instituted, on appellee's behalf, a petition for compensation under the Federal Employees' Compensation Act, 5 U.S.C.A. 751, and informed appellee that she could get compensation and that she could also sue the United States for damages, but that the amount of compensation she might receive would be deducted

from the amount. (R. 132 and 133.) Appellee believed these statements to be true and signed a claim for compensation under said Act, but before said application had been passed on, or any award made, appellee, on July 23, 1949, through her attorney, telegraphed her withdrawal of said claim to the Bureau of Employees' Compensation, requesting that her application for compensation be withdrawn without prejudice, as she contemplated a suit against the United States. (R. 203.) The libel herein was filed on August 1, 1949, before any award for compensation was made, a copy of said libel and the citation thereon was served on the United States attorney and copies were sent by registered mail to the Attorney General in Washington. On August 3, 1949, the Bureau of Employees' Compensation made its order awarding appellee compensation under the Federal Employees' Compensation Act. (R. 134.) Subsequently, two compensation checks were mailed to appellee, who did not accept said checks and sent them back to the Government (R. 135) with written instructions stating that she was not accepting compensation and had elected to sue, and requested that the Government send no further checks (R. 136 and 201). Thereafter, no further compensation checks were ever sent to appellee, and appellee has never accepted or cashed any compensation checks. (R. 135 and 136.)

SUMMARY OF ARGUMENT.

Appellee's argument can be reduced to the following points:

1. Prior to the amendment to the Federal Employees' Compensation Act, 5 U.S.C.A., Sec. 751 et seq., effective October 14, 1949, a Federal civil service employee, in the category of decedent herein, had an election to take compensation under the Act or pursue any judicial remedy that he might have, and the Federal Employees' Compensation Act was not exclusive as to him.

2. The non-acceptance of compensation under the Federal Employees' Compensation Act does not preclude a suit under the Public Vessels Act, 46 U.S.C.A. 781.

3. The Fellow Servant Doctrine is not applicable as a defense herein.

We shall discuss the points listed below, seriatim. The primary point of this brief, however, is devoted to the question whether compensation, when available, precludes recovery by suit.

A. THE FEDERAL EMPLOYEES' COMPENSATION ACT IS NOT EXCLUSIVE AS TO APPELLEE.

The Federal Employees' Compensation Act was originally enacted in 1916. Since that time, the Federal Appellate Courts have consistently held, until recent contrary decisions in the Second, Third, Fifth and District of Columbia Circuits, that a right to

such compensation, when available, does not preclude actions at law under the Public Vessels Act, Suits in Admiralty Act or under the Federal Tort Claims Act, and that a claimant has an absolute election whether to take either by way of compensation or by suit.

The Federal Appellate Courts, as early as 1921, in the Seventh Circuit, in the case of *Payne v. Cohlmeyer* (7 Cir. 1921) 275 F. 803, and in the Fifth Circuit, in 1922, in the cases of *Panama RR. Co. v. Strobel* (5 Cir. 1922) 282 F. 52, and *Panama RR. Co. v. Minnix* (5 Cir. 1922) 282 F. 47, have held that the remedy given to an employee of the United States for an injury incurred through negligence of the United States is not exclusive under the Federal Employees' Compensation Act, and that an injured Government civil service employee may at his election maintain an action at law or take compensation under the Act.

Payne v. Cohlmeyer, supra, involved an injury to a Deputy United States Marshal, who was injured in a railroad accident while on official duty. The Government there contended that his only right was to compensation under the Federal Employees' Compensation Act and not a suit against the United States Director General of Railroads. The Court therein said as follows:

> "Because plaintiff was a deputy marshal of the United States it is claimed his right to recover is fixed and determined by the Federal Compensation Act * * * We conclude, however,

> that he was in a position to maintain this action. While an employee may elect to take under the Compensation Act, he is not required so to do."

In the two *Panama RR. Co.* cases in the Fifth Circuit, supra, the question raised was whether a Government employee injured on the Panama Railroad was entitled to maintain an action at law, or whether the Compensation Act was the only remedy. The Fifth Circuit held that such Government employees had an election to either take compensation or to bring an action for damages.

The Fourth Circuit, in the cases of *Johnson v. United States* (4 Cir. 1950) 186 F. (2d) 120 and *United States v. Marine* (4 Cir. 1936) 155 F. (2d) 456, has recently expressly held that the Federal Employees' Compensation Act is not exclusive.

In the *Marine* case, a United States custom inspector was injured in the course of his employment while on a gangway leaving a vessel owned and operated by the United States. He brought action under the Suits in Admiralty Act, and the sole question involved was the Government's contention that the libelant's sole and exclusive remedy against the Government was a claim under the Employees' Compensation Act. Judge Groner in disposing of the contention said:

> "In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought

against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Employees' Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way. * * * What we have shown as to a lack of any reservation of immunity in the Suits in Admiralty Act, applicable in the circumstances of this case, impels the conclusion that there is nothing in the Act which expressly or impliedly excludes a Government employee from filing a libel under its terms. And in the same degree it is equally true that there is nothing in the Federal Employees Compensation Act which directly or indirectly would bar the right."

The *Johnson* case, cited supra, involved an injury to a civilian deck hand aboard a patrol boat, a public vessel of the United States in the harbor of Norfolk, Virginia. There again the Fourth Circuit reiterated its earlier decision in the *Marine* case and found the Government's contention untenable. The Court therein said, speaking through Judge Soper:

"The argument is not without persuasive force but we do not find it convincing, primarily because the special provisions which Congress has

made for members of the armed forces do not apply to civilian seamen. The right to compensation for injuries under the federal statute was not established especially for the protection of seamen but for all government employees in general; and they were not confined to the remedy by way of compensation prior to the amendment of the Compensation Act in 1949 cited above. Furthermore, the considerations of national security and military discipline do not apply with equal force to the smaller class of civilian seamen as to the naval personnel so as to justify the courts in ignoring the plain and comprehensive terms of the statute. That course may not be taken in any case unless the liberal construction leads to results so startling that they cannot reasonably be thought to have been within the legislative intent. U.S. v. American Trucking Ass'n, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L. Ed. 1345. * * * The legislative history of the Federal Employees' Compensation Act does not militate against this conclusion. It was passed in 1916 before the statutes which now permit suits against the United States for maritime torts and for torts in general. It was devoid of the provision usually found in compensation statutes that the benefits conferred upon the employee are exclusive of any other recovery against the employer; but this omission is understandable since there was no preexisting right to sue the United States for tort. The question of a possible choice of remedies did not arise until permissive statutes, broad enough to cover government employees as well as private citizens, were enacted;

> and when that occurred in the case of a postal employee injured on a railroad operated by the United States under the Federal Control Act of 1918, the court said in Dahn v. Davis, 258 U.S. 421, 429, 42 S.Ct. 320, 66 L.Ed. 696, that he had two remedies against the United States—one under that Act and one under the Compensation Act."

The United States Supreme Court in two decisions has by way of dicta, assumed that a federal employee has always had an election between tort action and a claim to compensation. In *Brady v. Roosevelt Steamship Co.,* 317 U.S. 575, 577; 87 L.Ed. 471, the Court said:

> "and we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act."

This case involved an injury to a customs inspector as the result of a defective ladder while leaving a vessel. The vessel was owned by the United States and operated by a private company for the Maritime Commission.

In *Dahn v. Davis,* 258 U.S. 421; 66 L.Ed. 696 the Supreme Court indicated that an injured railway mail clerk had an election to sue the Government for his injuries under the Federal Control Act of 1918 (40 Stat. at L. 451, Chap. 25) or else take under the Compensation Act.

For the last thirty years the United States Supreme Court and the Federal Appellate Courts have either

expressly recognized the right of election to sue in tort or take compensation, or else have consistently assumed such right of election and have granted relief under tort or admiralty action.

For years, numerous suits by civilian employees of the Government have been allowed to proceed to judgment in the Ninth Circuit of the United States Court of Appeals and the United States District Court for the Northern District of California without any discussion by the Court of the effect of the Federal Employees' Compensation Act.

United States v. Loyola (9th Cir. 1947) 152 F. (2d) 126 (wherein the Court held that a civil service employee on an Army transport had a right of action against the Government under the Public Vessels Act).

McInnis v. United States (9th Cir. 1945) 152 F. (2d) 387 (wherein the Court held that "the United States in the operation of its merchant vessels" is liable for the relief of a seaman for his maintenance and cure).

Thomason v. United States (9th Cir. 1950) 184 F. (2d) 105 (wherein the Court held that exclusive jurisdiction of wage suits by Federal civil service employees serving as seamen on public vessels is under the Public Vessels Act and Suits in Admiralty Act).

Gibbs v. United States, D.C.N.D. Cal. 1950 - 94 F.S. 586 (wherein a civilian repairman working on a Navy

carrier was injured and obtained judgment under the Public Vessels Act).

Sims v. United States, D.C.N.D. Cal. 1949 - 1950 A.M.C. 714.

In *Gibbs v. United States,* supra, Judge Goodman said:

> "Indeed numerous suits by seamen injured on government merchant vessels have been allowed to proceed against the United States and the United States Shipping Board Fleet Corporation without any discussion of the effect of the FECA. (Footnote.) The Supreme Court itself appears to have taken it for granted that the FECA is not an exclusive remedy. This it has done in several cases, even though what it has said may be characterized as dicta. Yet its reiteration, if it be dicta, is, to say the least, cumulatively persuasive."*

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*Judge Goodman in the Gibbs decision cites the following cases where injured seamen on Government merchant vessels have been allowed to proceed against the United States:

See, e.g. *Axtell v. United States,* D.C.E.D.N.Y. 1922, 286 F. 165; *Unica v. United States,* D.C.S.D. Ala. 1923, 287 F. 177; *Morris v. United States,* 2 Cir., 1924, 3 F.2d 588; *United States Shipping Board Emergency Fleet Corporation v. O'Shea,* 1925, 55 App.D.C. 300, 5 F.2d 123; *Zinnel v. United States S.B.E. F.C.,* 2 Cir., 1925, 10 F.2d 47; *Hansen v. United States,* D.C. S.D. Ga. 1926, 12 F.2d 321; *Maloney v. United States,* D.C.S.D. N.Y. 1927, 7 F.Supp. 14; *U.S.S.B.E.F.C. v. Greenwald,* 2 Cir., 1927, 16 F.2d 948; *Stewart v. United States,* D.C.E.D. La. 1928, 25 F.2d 869; *Howarth v. U.S.S.B.E.F.C.,* 2 Cir., 1928, 24 F.2d 374; *Ives v. United States,* 2 Cir., 1932, 58 F.2d 201; *Stratton v. United States,* D.C.S.D.N.Y. 1934, 8 F.Supp. 429; *Helmke v. United States,* D.C.E.D. La. 1934, 8 F.Supp. 521; *Carlson v. United States,* 5 Cir., 1934, 71 F.2d 116, 117; *Johnson v. United States,* 2 Cir., 1935, 74 F.2d 703; *Smith v. United States,* 5 Cir., 1936, 96 F.2d 976; *Desrochers v. United States,* 2 Cir., 1939, 105 F.2d 919.

B. DISTINGUISHING THE GOVERNMENT'S CASES.

The Government in support of its contention that the Federal Employees' Compensation Act is exclusive as to libelant and appellee herein relies upon the following four recent cases, all of which can be distinguished. These cases are *Mandel v. United States* (3d Cir.) decided August 16, 1951; *Johansen v. United States* (2d Cir.) decided July 30, 1951; *Lewis v. United States* (D.C. Cir. 1951) 190 F. (2d) 22; *Posey v. United States* (5th Cir. 1937) 93 F. (2d) 726.

Upon examination of these cases we find that in the *Mandel* and *Johansen* cases the Courts found an analogy between military personnel and civil service employees on military vessels *in military operations* and subject to military orders, and hence precluded civilian employees engaged in a military operation from tort action under the decision of *Feres v. United States,* 341 U.S. 138; 95 L.Ed. 135. In the instant case appellee was killed on vessel dockside in navigable waters and not while said vessel was engaging in military operations.

In the *Lewis* case a United States Park Policeman, killed on duty, was found by the Court to be analogous to a soldier in line of duty and hence precluded from the benefits of the Federal Tort Claims Act under the Feres decision.

In the *Posey* case the Court held that Congress had provided the Federal Employees' Compensation

Act as the exclusive remedy against the United States of injured employees of TVA, but the Court's decision was based entirely on features of the Tennessee Valley Authority Act which has no possible bearing here.

In the *Mandel* case a civilian officer of a Government tug was hit by a mine off Sardinia and killed, and the Court's decision was in a great part based on the fact that the Court found it against public policy to have judicial review of "negligence of an officer in a combat zone". The Court therein said:

> "We find weight in the government's argument that it would not be in the public interest to have judicial review of the question of negligence in the conduct of military, or semi-military, operations. The operation of ships or land forces in the presence of the enemy is a matter where judgments frequently have to be made quickly and where judgments so made by commanding officers must have prompt and immediate response. It will not, we think, aid in the operation of the armed forces if the propriety of a Commander's judgment is to be tested months or years afterwards by a court or a court and jury."

In the case at bar, Vatuone was killed not in a military or even a semi-military operation, but while working aboard a public vessel dockside at Oakland, California.

In the *Johansen* case the libelant was a member of the crew of an Army transport and it was agreed

by the parties in that case that at the time of libelant's injury *"the transport was engaged in a military operation"* and the Court therein stated:

> "Obedience by all members of the crew under the same sanctions may well be indispensable to the required maintenance of discipline in a military operation. Suits by civilian seamen, no less than by military personnel, would require judicial re-examination of the conduct of military affairs."

From the Court's language above it is apparent that its decision was based on the fact that at the time of injury the transport was engaged in a military operation and that the Court believed it would be against public policy to allow suit under those circumstances. It is incumbent upon us to again point out no military operation was being engaged in at the time of the death of decedent Vatuone herein. In fact, the United States District Court for the Southern District of New York, on June 26, 1951, in the case of *Smith v. United States,* 98 F.S. 1007, held that a civil service cattleman employed on a public vessel of the United States was entitled to recover a judgment under the Public Vessels Act and Suits in Admiralty Act for an injury sustained on board the vessel. It is obvious that the New York Court rightly allowed judgment, as the injured employee was not engaged in a military endeavor at the time of his injury.

In the *Lewis* case a member of the United States Park Police brought an action under the Federal Tort Claims Act for injuries he received when shot at in the course of duty pursuing fugitives. The Court therein followed the *Feres* case and found an analogy between police in line of duty and soldiers on duty and on that ground found it against public policy to allow the federal policeman to sue for such injuries. Judge Washington, who wrote the Lewis opinion, erroneously made the statement therein, that the Federal Employees' Compensation Act "expressly forbids them from suing the Government". Nowhere in that Act is there any such provision expressly forbidding suits by Federal employees.

By parity of reasoning Judge Washington found the federal policeman in the same category as the soldier in the *Feres* case when he said:

> "The analogy to the Feres case is given additional strength by the fact that a member of the United States Park police, though a civilian employee, occupies a status involving a high degree of discipline and physical risk. Sound policy would seem to require—and we think that Congress has required—that employees in such positions be not relegated to a remedy in tort but rather be protected by a well defined system of compensation for the hazards of their employment."

The distinction between the *Lewis* case and the case at bar lies in the difference that Vatuone was not involved in any military risk and was not subject

to military discipline at the time of injury and death, and hence does not come under that qualification.

The decision in the *Posey* case, as stated above, is based on the provisions of the Tennessee Valley Authority Act, expressly making the Federal Employees' Compensation Act the exclusive remedy for injured employees of the Authority.

Thus, it is patently obvious that all of the cases on which the Government relies are clearly distinguishable from the case at bar, as in the Vatuone case there is no reason why as a matter of public policy appellee should be precluded from the pursuit of a tort action under the Public Vessels Act, as Vatuone was not engaged in a military operation at the time of his death.

Judge Goodman in his excellent and comprehensive decision in the *Gibbs* case (supra) referring to *O'Neal v. United States* (2d Cir. 1926) 11 F. (2d) 869, *Dobson v. United States* (2d Cir. 1928) 27 F. (2d) 807, and *Bradey v. United States* (2d Cir. 1945) 151 F. (2d) 742 (certiorari denied 1946, 326 U.S. 795) all dealing with injuries to naval personnel said:

> "It is true that there are three cases in the Second Circuit denying *naval personnel* the right to sue under the Public Vessels Act. But those cases are, at best, merely analogous in that the remedy they hold to be the exclusive remedy available to naval personnel is that provided by the veterans' pension laws and not that accorded by the FECA. Moreover, the validity of those

decisions is now extremely doubtful in view of the Supreme Court's holding in Brooks v. United States, 1949, 337 U.S. 49, 69 S. Ct. 918, 920, 93 L. Ed. 1200, that there is nothing in 'the veterans' laws which provides for exclusiveness of remedy' so as to bar a suit by a serviceman under the Federal Tort Claims Act."

C. THE CONGRESSIONAL INTENT UNDER THE F.E.C.A.

In the *Mandel, Johansen* and *Lewis* cases the Courts, without the benefit of any of the Congressional records or debate concerning the enactment of the F.E.C.A. or its 1949 Amendment, merely assumed that the intention of Congress was that the Act was exclusive, even before Congress expressly made it so in its 1949 Amendment. A reading of the record of the Congressional debate and the statement of Senator Morse on the Amendment to F.E.C.A. in 1949 (Congressional Record of September 30, 1949—95 Congressional Record, Part 10, Pages 13608 and 13609) discloses that the purpose of the 1949 Amendment was to make the benefits more realistic in terms of present wage rates and prospectively to make the Act expressly exclusive as to federal employees, other than seamen. Congress recognized that the inadequacy of the benefits under the Act had caused federal employees to seek relief under general statutes, such as the Public Vessels Act and Suits in Admiralty Act, and wished to fill the gap between an election to sue

in tort or claim compensation by making the Act exclusive, prospectively when the new adequate compensation became applicable. The exclusive feature of the 1949 Amendment to F.E.C.A. by its terms does not apply to pending cases (5 U.S.C.A. 757) See 303(g).

The statement of Senator Morse on the subject (95 Congressional Record, Part 10, Pages 13608-13609) reads as follows:

> "In the report of the Senate committee, this provision is explained as follows:
>
> 'SEC. 201. Section 7 of the Act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. *Thus, an important gap in the present law would be filled* and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

'Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. *Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act,* and the like, authorize in general terms the bringing of civil actions for damages against the United States. *The inadequacy of the benefits under the Employees' Compensation Act has tended to cause Federal employees to seek relief under these general statutes. Similarly corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employments.*

'This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. *Since the proposed remedy would afford employees and their dependents a planned and substantial protection,* to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the Government.' "*

*Italics ours.

Congress, by its action in the 1949 Amendment, making F.E.C.A. exclusive after October 14, 1949, except as to seamen, recognized that the Act was not exclusive prior to that date. As Judge Goodman said in the Gibbs case (supra):

> "On October 14, 1949, the Congress added subsection (b) to Section 7 of the FECA, 5 U.S.C.A. §757(b), and there provided specifically and clearly that the Act was the exclusive remedy of all employees of the United States except the masters or members of the crew of vessels. Public Law 357 81st Cong., 1st Sess. The issue of exclusiveness of remedy therefore is no longer precedentially significant. The 1949 amendments may be said to have some argumentative weight as indicative of Congressional awareness that up to *that* time the compensation statute was not the exclusive remedy of employees; or, to say the least, that there was grave doubt in the matter."

Indeed, *Brooks v. United States,* 1949, 337 U.S. 49, 93 L. Ed. 1200, seems controlling, as the Court therein stated:

> "Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 USCA, §701, 11 FCA title 38, §701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensations statute, e.g. 33 USCA, §905, 10 FCA title 33, §905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. United States v. Standard Oil Co. 332 U.S. 301, 91 L. Ed. 2067, 67 S. Ct. 1604, indicates that,

so far as third party liability is concerned. *Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act,* 5 USCA, §757, 2 FCA title 5, §757."

II.

THE NON-ACCEPTANCE OF COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT DOES NOT PRECLUDE A SUIT UNDER THE PUBLIC VESSELS ACT.

Appellant claims that appellee effectively invoked a claim under the Employees' Compensation Act and is thereby barred from pursuing any claim under the Public Vessels Act. It clearly and unequivocally appears from the record that appellant *did not accept compensation payments.* Hence, she did not make an election to receive compensation rather than proceed by way of a libel under the Public Vessel Act. The facts show that the authorities at Fort Mason instituted on appellee's behalf a petition for compensation under the Federal Employees' Compensation Act, 5 U.S.C.A. 751, and informed her that she could get compensation and that she could also sue the United States for damages, but that the amount of compensation she might receive would be deducted from the amount. Appellee believed these statements to be true. Before said application had been passed upon, appellee officially requested that her application for compensation be withdrawn, because she contemplated bringing suit for damages against the United States.

This suit was commenced on *August 1, 1949.* On August 3, 1949 the Bureau of Employees' Compensation made its order awarding appellee compensation under the Federal Employees' Compensation Act. Subsequently, two compensation checks were mailed to appellee. *Appellee did not accept said checks* and sent them back to the Government with written instructions, stating that she was not accepting compensation and had elected to sue and requested that the Government send no further checks. Thereafter, no further compensation checks were ever sent to appellee and appellee has never accepted or cashed any compensation checks. Under these facts, we contend that appellee did not accept compensation and hence did not make an election to accept compensation in lieu of a suit for damages.

A case interpreting the election features of a law similar to the Compensation Act is *American Stevedores v. Porello,* 330 U.S. 446. In this case Porello, a longshoreman, was injured while working on a public vessel of the United States. Within two weeks of the accident his employer, American Stevedores, in compliance with Section 14 of the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.A., Section 900-950, began compensation payments to Porello before an award was made. He received these checks for a period of approximately six months and cashed all of them. Thereafter, he gave notice in accordance with Section 33(a) of said Act (33 U.S.C.A., Section 933(a)) of election to sue the

United States as a third party tortfeasor, rather than to receive compensation. In the same month he filed a libel to recover damages from the United States under the Public Vessels Act. The District Court held that Porello was not barred from maintaining the action before an actual award. The judgment was affirmed by the Court of Appeals. The case was then affirmed by the United States Supreme Court. The Court said:

> "Congress has provided that unless an employee controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor."

There is a distinction between our case and *Militano v. United States* (2d Cir. 1946) 156 F. (2d) 599, in that Militano not only applied for compensation under

the Federal Employees' Compensation Act (5 U.S. C.A., Section 751) but also accepted compensation under the Act. The Court held he therefore elected this remedy and could not later sue the United States. In the case at bar, appellee did not accept the compensation checks, but instead returned them to Washington to the Employees' Compensation Commission.

In *Mandel v. United States,* 74 F. Supp. 754, the Court stated:

> "The Government also claims that the remedy available under the United States Employees' Compensation Act bars the libel in these two cases. However, I feel that only *actual acceptance* of compensation under this Act extinguishes the remedy sought here."

Daln v. Davis, 258 U.S. 421, 66 L.E. 696, also holds that compensation must actually be accepted before one is precluded from his election to file suit.

III.

THE FELLOW SERVANT DOCTRINE IS NOT APPLICABLE.

The rights under the Jones Act, 46 U.S.C.A. 688 are enforceable under the Suits in Admiralty and Public Vessels Act.

In the case of *Hansen v. United States,* 12 F. (2d) 321 (S.D. Georgia 1926) it was held that in a suit brought by a seaman against the United States, under the Suits in Admiralty Act, for personal injury received on board a ship owned and operated by the

United States, that such an action is governed by the provisions of the Jones Act, and it is not a defense that the injury was caused by the negligence of an officer or fellow seaman.

The Supreme Court has held in *International Stevedoring Co. v. Haverty* (1926) 272 U.S. 50; 71 L. Ed. 157, that workmen injured in the course of their employment while working on a vessel docked in navigable waters are "seamen" under the Jones Act and therefore entitled to recover, notwithstanding the Fellow Servant Doctrine, and that the latter doctrine is abolished by the Jones Act when it incorporated the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq.

This same rule is followed in *Northern Coal & Dock Co. v. Strand,* 278 U.S. 142; 73 L. Ed. 232 and *Seas Shipping Co. v. Sieracki,* 328 U.S. 84; 90 L. Ed. 1099.

Vatuone, while working on a vessel in navigable waters of the United States, was hence a "seaman" with all the rights given by the Jones Act, including the abolition of the fellow servant defense.

In *Buzynski v. Luckenbach,* 277 U.S. 226; 72 L. Ed. 861, the Court said:

> "And in International Stevedoring Co. v. Haverty, 272 U.S. 50, 52; 71 L. Ed. 157, 159, 47 S.Ct. Rep. 19, we held that the word 'seaman' as used in Sec. 33 included a stevedore engaged in the maritime work of stowing cargo upon a vessel, and that under the applicable provisions of the Employers' Liability Act, he could recover

> from the stevedoring company for an injury caused by the negligence of a fellow servant."

The cases cited by appellant in the footnote on page twenty of its brief in support of its contention that the fellow servant rule applies herein are obsolete and with the exception of Hammond Lumber Co. v. Sandin (9th Cir. 1927) 17 F. (2d) 760, were all decided either before the enactment of the Jones Act in 1920 or before the Supreme Court decision in the International Stevedoring Co. v. Haverty case (supra) in 1926, wherein the Supreme Court stated that all workmen on vessels in navigable waters of the United States were "seamen" under the Jones Act, especially where, as in the case at bar, such duties entailed work for the benefit of the ship formerly done by crew members. The Hammond Lumber case cited by appellant is indeed good authority for appellee, as in that case the Ninth Circuit, through Judge Kerrigan, recognized the impact of the International Stevedoring case and said disposing of a contention in that case that an injured longshoreman was a fellow servant of the mate:

> "but we think that the question becomes immaterial in this case, since the evidence clearly established that the negligence which caused Sandin's injuries was attributable either to the mate in the giving of his order, or to the faulty construction, by the sailors, of the sling load which collapsed, and in either case the defendant would be liable (International Stevedoring Co. v. Haverty (decided October 18, 1926, by the

Supreme Court of the United States) 47 S. Ct. 19; 71 L. Ed. —)."

Appellee believes it incumbent upon her to call the Court's attention to the fact that in the case at bar the Government, appellant, did not raise the fellow servant defense either in its answer or at the trial herein, and it is for that further reason precluded from raising it now.

CONCLUSION.

For the foregoing reasons, appellee respectfully submits that the judgment herein should be affirmed.

Dated, San Francisco, California,
October 15, 1951.

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